(1) 89-144

No. 89-____

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Petitioner

v.

BICKERSTAFF CLAY PRODUCTS CO., INC. and NATIONAL LABOR RELATIONS BOARD,
Respondents

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT J. CONNERTON *
THEODORE T. GREEN
LAURENCE E. GOLD
905 16th Street, N.W.
Washington, D.C. 20006
(202) 737-8320
Attorneys for Petitioner Local Union No. 246, Laborers' International Union of North America, AFL-CIO

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

22 pp
1 Foldout

QUESTIONS PRESENTED

1. Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the National Labor Relations Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees.

2. Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the National Labor Relations Board must presume that replacements for striking employees do not support the union as their bargaining representative where the union is seeking the replacements' discharge and the replacements cross union-sponsored picket lines in order to report to work.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the National Labor Relations Board were those identified in the caption. The parties to the proceeding before the Court of Appeals were the National Labor Relations Board and Bickerstaff Clay Products Co., Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. The Court Should Grant the Petition to Intervene	8
II. The Court Should Grant the Petition for a Writ of Certiorari	12
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	Page
Banks v. Chicago Grain Trimmers Association, 386 U.S. 1002 (1967)	10
Banks v. Chicago Grain Trimmers Association, 390 U.S. 459 (1968)	10, 11
Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981)	7
Buckley Broadcasting Corp. of California d/b/a Station KKHI (Station KKHI), 284 NLRB No. 113 (July 27, 1987), *application for enforcement pending*, 284 NLRB No. 113 (9th Cir. filed March 7, 1988)	6, 8, 12, 13, 14
Chicago Grain Trimmers Association, Inc. v. R.C. Enos, 369 F.2d 344 (7th Cir. 1966)	10
Eastern-Central Motor Carriers Association v. United States, 321 U.S. 194 (1944)	9
Edward G. Budd Manufacturing Co. v. NLRB, 332 U.S. 840 (1947)	9
Hajoca Corp. v. NLRB, 872 F.2d 1169 (3rd Cir. 1989)	13
Hunter v. Ohio ex rel. Miller, 396 U.S. 879 (1969)	10
International Union of Mine, Mill and Smelter Workers, Local No. 15 v. Eagle-Picher Mining and Smelting Company, 325 U.S. 335 (1945)	9
International Union, United Automobile Workers v. Scofield, 382 U.S. 205 (1965)	9, 11
New York v. Smith, 469 U.S. 1227 (1985)	9
NLRB v. ACME Industrial Company, 384 U.S. 925 (1966)	8, 9
NLRB v. Curtin Matheson Scientific, Inc., 57 U.S.L.W. 3835 (No. 88-1685), *granting cert. to* 859 F.2d 362 (5th Cir. 1988)	3, 12, 14
NLRB v. Pennco, Inc., 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982)	13, 14
NLRB v. Randle-Eastern Ambulance Service, Inc., 584 F.2d 720 (5th Cir. 1978)	12, 14
NLRB v. Windham Community Memorial Hospital, 577 F.2d 805 (1978)	13
Pyramid Lake Paiute Tribe of Indiana v. Truckee-Carson Irrigation District, 464 U.S. 863 (1983)	9

TABLE OF AUTHORITIES—Continued

Statutes:	Page
28 U.S.C. 1254(1)	1, 9, 10
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 3(d), 29 U.S.C. 153(d)	9
§ 7, 29 U.S.C. 157	9
§ 8(a)(1), 29 U.S.C. 158(a)(1)	2, 5
§ 8(a)(5), 29 U.S.C. 158(a)(5)	2, 5
§ 10(b), 29 U.S.C. 160(b)	9
§ 10(e), 29 U.S.C. 160(e)	7
§ 10(f), 29 U.S.C. 160(f)	7, 9, 11
Miscellaneous:	
R. Gorman, *Labor Law* (1976)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89- ——

LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Petitioner

v.

BICKERSTAFF CLAY PRODUCTS CO., INC. and NATIONAL LABOR RELATIONS BOARD,
Respondents

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Local Union No. 246, Laborers' International Union of North America, AFL-CIO petitions for leave to intervene and further petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-29a), is reported at 871 F.2d 980. The decision and order of the National Labor Relations Board (App. 30a-54a) are reported at 286 NLRB No. 27.

JURISDICTION

The judgment of the Court of Appeals (App. 1a) was entered on April 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 158(a)(1) and (5), provide:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.

Section 7 of the NLRA, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT OF THE CASE

At the conclusion of an economic strike by petitioner Local Union No. 246, Laborers' International Union of North America, AFL-CIO (Union), the respondent employer, Bickerstaff Clay Products Co., Inc. (Bickerstaff), claiming a "serious[] doubt" that the Union continued to represent a majority of the bargaining unit employees, withdrew recognition from the Union and declined to sign a successor collective bargaining agreement. The National Labor Relations Board (NLRB or Board) disagreed and issued an order directing Bickerstaff to recog-

nize the Union, execute the collective bargaining agreement and, upon request, bargain with the Union as the employees' exclusive representative. In assessing whether or not Bickerstaff had shown that it had a good faith doubt based on objective considerations that the Union represented the majority of its employees when Bickerstaff withdrew recognition, the Board held that it would apply no presumption regarding whether striker replacements hired by Bickerstaff supported or did not support the Union.

The Court of Appeals denied enforcement to the Board's order. The court declined to embrace the Board's "no-presumption" rule, and instead applied a presumption that striker replacements oppose an incumbent union where the union is bargaining for their discharge to make room for returning strikers, and the striker replacements cross union-sponsored picket lines in order to report to work. Petitioner seeks review of that decision, which presents important and recurring questions on which the circuits are divided, and one of which is identical to the question presented in *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 57 U.S.L.W. 3835 (No. 88-1685), *granting cert. to* 859 F.2d 362 (5th Cir. 1988).

1. Respondent Bickerstaff is a manufacturer and vendor of brick and tile products operating four manufacturing plants in Russell County, Alabama. App. 2a. In 1965 the Board certified the Union as the exclusive bargaining representative for the production and maintenance employees in one of Bickerstaff's plants. In 1966 Bickerstaff voluntarily recognized the Union as the exclusive bargaining representative of its production and maintenance employees in its other plants, and the Union and Bickerstaff subsequently entered into a series of collective bargaining agreements. App. 2a-3a.

The most recent such agreement expired by its terms on October 31, 1985, but was extended by mutual agree-

ment to November 10, 1985. App. 3a. Negotiations for a successor agreement began on September 17, 1985 but produced no new agreement. *Ibid.* On November 6, 1985, Bickerstaff made a "final offer" to the Union. The membership of the Union rejected this offer on November 10, 1985, and voted to begin an economic strike the next day. *Ibid.* Of the 304 bargaining unit employees, 195 originally particpiated in the strike. Bickerstaff continued operations with the 109 unit employees who did not strike and immediately began hiring permanent replacements for the striking employees. *Ibid.* The striking employees picketed Bickerstaff's office and each of its four plants. *Ibid.*

Union and Bickerstaff representatives met on four occasions betwen November 18, 1985 and January 13, 1986 but reached no agreement. During these meetings the Union proposed that at the conclusion of the strike Bickerstaff staff the plants with returning strikers in preference to striker replacements. App. 3a-4a. On January 23, 1986, Bickerstaff advised the Union that negotiations were at an impasse and that Bickerstaff was implementing its final offer. App. 4a. On April 8, 1986, the Union informed Bickerstaff that it accepted its final offer, unconditionally offered to have the striking employees return to work, requested that Bickerstaff meet and sign a new agreement containing the terms of the final offer, and requested a listing of all employees currently working along with certain information regarding those employees. App. 4a & n.4.

The next day, April 9, 1986, Bickerstaff notified the Union that it "seriously doubt[ed] that your union represents the majority of our employees" and refused the Union's request for employee information. Bickerstaff further advised that it was withdrawing recognition of the Union, that its final offer was no longer outstanding, and that it would not comply with the Union's request

to sign a collective bargaining agreement. Bickerstaff thereafter refused to bargain with the Union. App. 4a-5a.

As of April 4, 1986, there were 304 working employees, of whom 93 were striker replacements, 133 were strikers who had crossed the picket lines and returned to work, and 78 were employees who had not struck. App. 14a.

2. On April 11, 1986, the Union filed unfair labor practice charges with the Board, alleging violations of sections 8(a)(1) and (5) of the NLRA, 29 U.S.C. § 158(a)(1) and (5), and the Board issued a complaint against Bickerstaff on May 16, 1986. App. 5a. On December 15, 1986, the Administrative Law Judge (ALJ) decided that Bickerstaff violated the Act by its withdrawal of recognition, refusal to execute the agreement, and refusal to furnish the Union with the employee information it had requested. App. 6a.

The ALJ explained that "where the employer and the Union were parties to one or more collective bargaining agreements, it is presumed that the Union continued to serve pursuant to the wishes of a majority of the employees in the bargaining unit. . . . That presumption continues after the collective bargaining agreement expires. . ., and may be rebutted by evidence showing either (1) that the Union actually lost its majority support; or (2) that the employer had a good-faith doubt based on objective considerations of the continued existence of majority support for the Union." App. 39a (citations omitted). The ALJ determined that Bickerstaff made neither showing.

First, the ALJ found that Bickerstaff's final offer remained outstanding at the time of the Union's acceptance of it because the offer had not been explicitly withdrawn and no circumstances had arisen that would lead the parties to reasonably believe that it had been withdrawn. App. 42a. Second, the ALJ rejected Bickerstaff's contention that a presumption arises that new hires and former

strikers who cross the picket line in an atmosphere of violence did not support the Union, finding that there was but a brief period of violent activity at the beginning of the strike in November 1985, and that the record did not show which of the 85 replacements hired before then were among the 93 striker replacements still working on April 4, 1986; a total of 227 striker replacements were hired during the strike. App. 44a-45a. The ALJ found no "probative evidence showing that a substantial number of the replacements expressed disinterest in the Union." App. 48a. Finally, the ALJ rejected Bickerstaff's assertions that there was "disillusionment and dissatisfaction" with the Union and that withdrawals of dues checkoff deductions authorizations and employee expressions of a desire to resign from the Union demonstrated a loss of majority support. App. 45a-46a. The ALJ declined to find a loss of majority in the fact that 15 of 147 returning strikers resigned from the Union. App. 48a. Finally, the ALJ rejected Bickerstaff's contention that the Union had abandoned its representative role, or that a drop-off in picketing activities demonstrated abandonment of the Union. App. 46a.

Bickerstaff filed exceptions to the ALJ's decision with the Board, which affirmed, with modifications, the ALJ's decision and order. App. 30a-31a. The Board found that "the total evidence presented by [Bickerstaff] is insufficient to rebut the presumption of the continued majority status that the Union enjoyed as the incumbent bargaining representative. We find it unnecessary to apply any presumption whether the employees who replaced the strikers supported or did not support the Union." App. 30a n.2. For this proposition the Board cited its decision in *Buckley Broadcasting Corp. of California d/b/a Station KKHI (Station KKHI)*, 284 NLRB 113 (July 27, 1987), *application for enforcement pending*, No. 88-7106 (9th Cir. filed March 7, 1988). *Ibid.* In that case, the Board decided that no presumption regarding the union

adherence of striker replacements should be applied and that the Board should take a case-by-case approach requiring "some further evidence of union non-support" by replacements in evaluating the significance of their numbers to an employer's showing of good-faith doubt of continued majority support for a union. *Ibid.*

In the present case, the Board ordered that Bickerstaff cease and desist from its unlawful behavior; execute the collective bargaining agreement agreed to by the Union on April 8, 1986, and implement the terms of that agreement effective that date; upon request, bargain with the Union; furnish the requested employee information; and post an appropriate notice. App. 50a-52a.

3. Pursuant to NLRA § 10(f), 28 U.S.C. § 160(f), Bickerstaff petitioned the United States Court of Appeals for the Eleventh Circuit to review the Board's order, and the Board, pursuant to NLRA § 10(e), 29 U.S.C. § 160 (e), cross-petitioned the Court of Appeals for enforcement of its order. App. 1a. The Court of Appeals denied enforcement, concluding that Bickerstaff had a reasonable, good-faith doubt that the Union represented the majority of bargaining unit employees when Bickerstaff withdrew recognition. App. 27a-29a.

The court focused principally on the significance of the permanent replacement of striking employees. Reviewing the treatment of this issue by the Fifth [1] and other circuits, as well as by the Board itself, the court asserted that "[a]lthough mere high employee turnover is not normally a sufficient ground to negate a Union's presumed majority status, the permanent replacement of striking employees presents a different situation." App. 17a-18a. The court concluded that, at least where the Union was bargaining for the discharge of striker replacements to

---

[1] The decisions of the United States Court of Appeals for the Fifth Circuit prior to September 30, 1981 are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

make room for returning strikers, and where striker replacements crossed union-sponsored picket lines to report to work each day, the so-called "Gorman presumption" should apply. App. 23a-24a. That presumption, drawn from Professor Gorman's labor law text, asserts that "it is generally assumed that [a replacement] does not support the Union and that he ought not to be counted toward a Union majority." R. Gorman, *Labor Law* 112 (1976). The court determined that the Gorman presumption was consistent with the Board's decision in *Station KKHI*, and held that the under the circumstances of the case, Bickerstaff had presented the requisite "further evidence" of a lack of majority support for the Union. App. 23a.

The court further held that Bickerstaff's good-faith doubt was properly predicated on other factors, including the level of strike participation, the number of returning strikers, the number of employees resigning from the Union or withdrawing from dues checkoff authorizations, and evidence of a breakdown in union leadership, union dormancy, and employee dissatisfaction and disillusionment with the Union. App. 24a-25a.

REASONS FOR GRANTING THE PETITIONS

I. The Court Should Grant the Petition to Intervene

The NLRB has informed petitioner Union that it does not intend to petition this Court for a writ of certiorari in this case. In the proceedings below, the Union was a party to the proceedings before the ALJ and the Board. Because the Union was not a party in this case before the Court of Appeals, however, it petitions this Court to grant it intervention in order to present its petition for a writ of certiorari.[2]

---

[2] Petitioner plainly has standing to seek review of the ruling below. *NLRB v. Acme Industrial Company*, 384 U.S. 925 (1966). For, although the NLRA vests in the Board the authority to prose-

On numerous occasions, the Court has also granted leave to intervene in this Court in order to present petitions for writs of certiorari to petitioners who were not parties in the proceedings in the Court of Appeals. *E.g.*, *New York v. Smith*, 469 U.S. 1227 (1985); *Pyramid Lake Paiute Tribe of Indiana v. Truckee-Carson Irrigation*

---

cute complaints against employers and unions, and to enforce its orders in the Courts of Appeals, that statute also provides, and this Court has also recognized, that charging and charged parties, who are the real parties of interest in any Board proceeding, enjoy a special role in appellate review of Board cases.

The NLRA provides that in unfair labor practice cases, the General Counsel of the Board has the sole authority to file complaints against charged parties, such as Bickerstaff, and otherwise to seek an adjudication of unfair labor practice charges filed by private parties such as the Union. NLRA §§ 3(d) and 10(b), 29 U.S.C. §§ 153(d), 160(b). The NLRA also authorizes "any person aggrieved" by a decision of the Board to seek review thereof in the Court of Appeals. NLRA § 10(f), 29 U.S.C. § 160(f). The Court has held that successful charging or charged parties before the NLRB may intervene in Court of Appeals review proceedings, *International Union, United Automobile Workers v. Scofield*, 382 U.S. 205 (1965), and may thereafter petition this Court for a writ of certiorari to the Court of Appeals. *Id.* at 208-09; *International Union of Mine, Mill and Smelter Workers, Local No. 15 v. Eagle-Picher Mining and Smelting Company*, 325 U.S. 335, 338-39 (1945). Both the aggrieved person who seeks appellate review and the intervenor on appeal are "parties" within the meaning of 28 U.S.C. § 1254(1), permitting either to petition this Court to issue a writ of certiorari.

The Court has also granted petitions by labor unions to intervene in this Court in Board cases where either the Board or the charged employer filed the petition for a writ of certiorari, *NLRB v. Acme Industrial Company; Edward G. Budd Manufacturing Co. v. NLRB*, 332 U.S. 840 (1947), including where the union was not a party in the Court of Appeals. *NLRB v. Acme Industrial Company; see Acme Industrial Company v. NLRB*, 351 F.2d 258 (7th Cir. 1965), *reversed*, 385 U.S. 432 (1967). *See also Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 199 n.5 (1944) (on appeal from District Court decree, party that did not appear before District Court permitted to intervene in appeal to Supreme Court).

District, 464 U.S. 863 (1983); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459 (1968).

The leading and most fully articulated decision on this point is *Banks*. In that case, the Court granted both petitioner's motion for leave to intervene and its petition for a writ of certiorari. The petitioner in *Banks* had obtained an award of death benefits under the Longshoremen's and Harbor Workers' Compensation Act as a result of her husband's fatal injury. Her husband's employer brought an action in the United States District Court against the Deputy Commissioner of Labor seeking to set the award aside. The employer lost in the District Court but prevailed on appeal. *Chicago Grain Trimmers Association, Inc. v. R.C. Enos*, 369 F.2d 344 (7th Cir. 1966). Banks was not made a party and did not intervene in either court. The Government declined to petition this Court for a writ of certiorari, and Banks then sought to intervene in this Court in order to file her own petition.

The Court invited the Solicitor General to file a brief expressing the views of the United States. 386 U.S. 1002 (1967). Then-Solicitor General Marshall filed a brief supporting Banks' petition to intervene, stating at pp. 2-3:

> There is a threshold question whether this Court has jurisdiction to grant a writ of certiorari as prayed for in the petition. While it is true that "any party" may file a petition (28 U.S.C. 1254(1)), petitioner was not formally made a party in the proceedings below. She did not seek leave to intervene until after the judgment of the court of appeals was rendered, and the motion to intervene which she then filed was denied by the district court. On the other hand, the procedure whereby the award is defended by the government in the courts is not designed to vindicate any independent governmental interest, but, rather, to remove the burdens of litigation from the shoulders of the compensation claimants, who are rarely individ-

> uals of means. In a practical sense, therefore, the claimant is the real party in interest in the judicial proceedings even if not formally named, and it would not appear unreasonable to deem petitioner a party below for purposes of entitlement to file a petition for a writ of certiorari. [Footnote omitted.]

The Court granted the petitions for intervention and for a writ of certiorari, 389 U.S. 813 (1967), and decided the case on the merits 390 U.S. 459 (1968).

In the present case, petitioner Union stands in much the same posture as petitioner Banks. The agency designated by law to represent its interests in administrative and judicial proceedings has declined to seek review in this Court of an adverse decision by the Court of Appeals. In the proceedings below, the Board acted as the attorney for the Union, in accordance with the statutory scheme. Nonetheless, following the Court of Appeals' refusal to enforce its order, the Board decided not to petition this Court to review that decision. Petitioner Union has an obvious stake in the outcome of this controversy, for its rights and those of its members under the NLRA are squarely at issue. Indeed, had the Board on the merits of this case reached the result embraced by the Court of Appeals, the Union would have been a "party aggrieved" within the meaning of NLRA § 10(f), 29 U.S.C. § 160 (f), and thereby accorded the explicit right to seek review in the Court of Appeals and, if necessary, to file a petition for a writ of certiorari. Petitioner Union had no occasion to petition the Court of Appeals to review the Board's decision in its favor, and the Board represented its interests before that court. Now that the Board has decided to cease its litigative efforts, the Union seeks to intervene in this Court. Petitioner respectfully submits that, consistent with *Scofield*, *Banks* and the other cases cited herein, and in light of the significant issues presented in this case described *infra*, the Court should grant petitioner's motion for leave to intervene for the pur-

pose of petitioning this Court to issue a writ of certiorari to the Eleventh Circuit.

II. The Court Should Grant the Petition for a Writ of Certiorari

On June 26, 1989 the Court granted the petition for a writ of certiorari to the fifth Circuit filed by the NLRB in *NLRB v. Curtin Matheson Scientific, Inc.*, 57 U.S.L.W. 3835 (No. 88-1685), *decision below* 859 F.2d 362 (5th Cir. 1988). The question presented in that case is identical to the first question presented in the case at bar. *See* 57 U.S.L.W. 3835. Because the Court has already decided to review the decision of the Fifth Circuit, petitioner Union herein submits that its petition too should be granted, adopts the NLRB's arguments to this Court for granting the writ to the Fifth Circuit, and will confine its argument herein to the reasons why the Court should review the decision of the Eleventh Circuit as well.

In *Curtin Matheson*, the Fifth Circuit concluded that the Board's no-presumption standard in *Station KKHI* "[o]perationally . . . has the same effect" as the Board's previous presumption that was discarded in *Station KKHI*, namely, "that striker replacements support the union in the same ratio as the employees they replace." 859 F.2d at 367. In its decision below, the Eleventh Circuit correctly noted that, in fact, the two standards differ in the nature and amount of "further evidence of union non-support" required from an employer seeking to demonstrate a good faith doubt that an incumbent union retains its majority status. App. 22a. But in its analysis of the same Fifth Circuit precedent upon which the Fifth Circuit in *Curtin Matheson* relied in rejecting the Board's no-presumption rule in favor of the Gorman presumption, *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), the Eleventh Circuit reasoned that *Randle-Eastern* was consistent with *Station KKHI* because the Gorman presumption should

apply where "the union is negotiating for [the striker replacement's] discharge and he crosses a union-sponsored picket line, violent or not, to report to work each day." App. 23a-24a.

The Eleventh Circuit's variation of the Gorman presumption is erroneous and should be reversed by this Court in addressing the questions presented by this petition. Neither of the circumstances cited below provides "further evidence of union non-support" by striker replacements; rather, they are simply presumptions additional to the Gorman presumption itself. As the Second Circuit held in rejecting the Gorman presumption, "many workers might well be pro-Union but might need the job or might reject the use of strikes in [the particular industry]"; "presumptions do not provide [the objective] evidence" necessary to sustain an employer's burden of proof. *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 813 (1978).

With respect to the presumption regarding the effect of union efforts to obtain hiring preferences for strikers, such demands are almost universally made in strike situations, and no more justify a presumption that striker replacements do not support the union than the fact of their employment itself. With respect to the presumption that the mere crossing of a picket line provides "further evidence of union non-support" even under the Board's *Station KKHI* standard, picket lines too are almost universally established in the course of strikes; if that circumstance were to provide the required "further evidence," it would eviscerate rather than satisfy the evidentiary requirement. *See Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1174 (3rd Cir. 1989) ("Workers may cross picket lines as replacements, . . . not out of opposition to unions but due to economic necessities."). *See also NLRB v. Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982) (rejecting the employer's sug-

gested presumption that no replacement supports the union "when violence occurs on the picket line").

The Eleventh Circuit's decision below deepens the circuit conflict on these issues. Thus, the Eleventh Circuit, while acknowledging that "the events leading to the withdrawal of recognition in this case are essentially identical to those found in *Curtin Matheson*" App. 27a n.17, formulated a different variation of the Gorman presumption. In doing so, the court erroneously cited as evidentiary matters two factors that simply add further presumptions to the Gorman standard. Because the Courts of Appeals are divided as to whether or not these matters are properly viewed as presumptions or as evidence, and are further divided as to their significance to the ultimate conclusion about an employer's good faith doubt of continued majority status, the Court should grant the petition herein in order to consider this question along with the question presented both in this case and in *Curtin Matheson.*

In dissenting from the Court's denial of certiorari in the *Pennco* case, three Members of the Court, per Justice White, concluded that "the question of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union . . . are of obvious significance to national labor policy." 459 U.S. 994, 996 (1982). The decision below affords the Court a further appropriate vehicle to resolve the circuit conflicts on these questions. The Eleventh Circuit held that the no-presumption rule established in *Station KKHI* could be "reconciled" with the Gorman presumption embraced by the Fifth Circuit in *Randle-Eastern.* That conclusion is demonstrably incorrect, as is the variation of the Gorman presumption embraced below, and this Court should so decide.

CONCLUSION

The petitions for leave to intervene and for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. CONNERTON *
THEODORE T. GREEN
LAURENCE E. GOLD
905 16th Street, N.W.
Washington, D.C. 20006
(202) 737-8320
Attorneys for Petitioner Local Union No. 246, Laborers' International Union of North America, AFL-CIO

July 1989

* Counsel of Record

CERTIFICATE OF SERVICE

I, Caroline McSherry Dolan, hereby certify that three copies of the foregoing Petition for Leave to Intervene and Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and Appendix thereto were served this 26th day of July, 1989 by United States Postal Service, First Class mail, postage prepaid on the following counsel:

Richard Y. Bradley
Hatcher, Stubbs, Land, Hollis
& Rothschild
500 The Corporate Center
P.O. Box 2707
Columbus, Georgia 31993-5699

Aileen Armstrong
Deputy Associate to General Counsel
John Burgoyne
Assistant General Counsel
National Labor Relations Board
Appellate Court Branch
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570-0001

Caroline McSherry Dolan
Law Clerk to Petitioner Local 246,
Laborers' International Union of
North America, AFL-CIO

Sworn and Subscribed to before me
this 26th day of July, 1989.

NOTARY PUBLIC

My Commission Expires: _____

Debra M. Ramos
Notary Public
District Of Columbia
My Commission Expires Sept. 14, 1989